



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-12**

A REQUEST FOR REVIEW of a decision by the **DEPARTMENT OF AGRICULTURE AND FISHERIES** not to grant a fee waiver.

July 12, 2006

ISSUE:

Whether Section 11(7) of the *Freedom of Information and Protection of Privacy Act* supports the decision of the Department of Agriculture and Fisheries not to grant a fee waiver.

This review arises from a request by an Applicant under the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP Act*") to the Department of Agriculture and Fisheries ("Department") on September 19, 2005. The Applicant requested, "The database containing all records of food inspections at restaurants, grocery stores, etc. for 2005, 2004, 2003, 2002; the restaurants listed which had to destroy food in 2002, 2003, 2004, 2005 and which were identified as having pest/rodent problems in 2002, 2003, 2004, 2005." After seeking further clarification from the Applicant the scope of the application was focused to "one year of information from January 1, 2005 to December 31, 2005 for the following types of facilities; grocery/convenience, supermarket, full menu facilities, lounge/taverns and quick service facilities within the Halifax Regional Municipality."

The Applicant also requested a fee waiver on the basis of public interest and that the material be provided in electronic format. On December 16, 2005 the Department advised the Applicant it can send the material in paper format only and on January 31, 2006, the Department advised the Applicant it would not waive the fees.

On February 2, 2006, the Applicant asked the Review Officer to recommend to the Department it waive the fee estimate and provide the information in the requested format. During the Review Office's mediation stage, the issue of format was resolved.

Section 11 of the *FOIPOP Act* allows a public body to charge fees for processing applications and section 6 of the Regulations sets the fees that can be charged for locating a record, preparing the record for disclosure, shipping and handling of the record and providing copies. After clarifying the scope of the Application for Access, the Department provided an itemized fee estimate to the Applicant as required. The final amount provided to the Applicant to process the request was reduced to \$435.44, from the original fee estimate of \$14,711.76. The Applicant confirmed the calculation of the fee was not an issue in this case.

RELEVANT LEGISLATION:

Section 11(7) of the *FOIPOP Act* allows a public body, on request, to excuse an applicant from paying all or part of the fee if, in the public body's opinion,

- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment; or

- (b) the record relates to a matter of public interest, including the environment or public health or safety.

In keeping with the Reiview Office's general practice for addressing the issue of public interest in submissions, both the Applicant and the Department were provided with the following guiding factors as outlined in Review Report FI-00-91:

“Public interest is not defined in the *Act*. I, and other information and privacy commissioners, have articulated a two step process which we have suggested public bodies follow when deciding whether to grant a fee waiver:

- has the matter been a subject of recent public debate?
- does the subject matter relate directly to the environment, health or safety?
- would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?
- do the records show how the public body is allocating financial or other resources?

If a public body agrees that the matter is in the public interest it would consider other factors:

- is the applicant's primary purpose to disseminate the information in a way that could reasonably be expected to benefit the public or serve a private interest?
- is the applicant able to disseminate the information?

It is not necessary for all these factors to apply in order to encourage a public body to waive fees, nor is a public body left with two choices. A reduction of fees is another option. Section 11(7) reads that the public body “may excuse an applicant from paying all or part of a fee” if “in the head's opinion” either subsections (a) or (b) apply. In any case I agree with the British Columbia Information and Privacy Commissioner that “any attempt to define exhaustively or finally what is meant by the term ‘public interest’ is doomed to failure”. (Order # 332-1999) This is probably why the drafters of the legislation left it undefined. However, I think the factors offer a helpful guide.”

SUBMISSION OF THE APPLICANT:

The Applicant acknowledged the confidentiality restrictions regarding personal information and expressed no interest in seeking personal information, rather information about the businesses.

The Applicant indicated the fees should be waived in the ‘public interest’ and in the “interest of public safety.” The Applicant stated, “...having open access to this information is in the public interest, because everyone eats and therefore their health and well-being is directly related to operating practices of any business that sells or serves food.” In addressing the issue of public interest, the Applicant submitted that inspections on businesses which sell or serve food are conducted for public safety and questioned “how is the public being kept safe if they cannot access information gleaned from such inspections to verify that they are being kept safe by the government’s measures and policies?” The Applicant further submitted such information “...as a matter of routine, is part of the public domain in other parts of Canada and the United States. Cities such as Vancouver, Toronto and Victoria have open inspection systems and post such records online for the public.”

The Applicant also noted when commenting publicly on a similar past Access Request, the former Review Officer in Vol. #7, No. #10 of the Halifax Commoner stated, “Agriculture and Fisheries should not be using the *Act* to restrict access to information, if they’ve deemed that the information can be shared with the public. If they’re prepared to give it out, and it’s all available to go out, there should be no charge for it, and no charge for the application...if they’re going to give it out in drips and drabs, they may as well give it out in bulk.”

SUBMISSION OF THE PUBLIC BODY:

The Department advised its Food Safety Section “has the administration responsibility under the *Health Act* for licensing and inspection of any food establishment that prepares, processes and/or serves food.” The Department explained the “goal of the food safety program is to ensure a safe environment for the public, which is through a combination of inspection and enforcement, education and industry standards. On its own, the inspection report cannot ensure public safety.” The Department informed the purpose of the inspection process is “to ensure that the establishment is in compliance with regulations as well as industry standards relating to the safe handling and serving of food. It is designed to educate the establishment on what they are doing incorrectly that could lead to an incident of food borne illness.” The Department reiterated the purpose of the inspection reports, which is in paper format, is to “note any deficiencies...that the inspector finds at the time of an inspection.”

The Department stated inspection reports do not “communicate to the public that this is a good or bad food establishment to eat at or shop at, it simply notes the deficiencies identified

during the inspection process. The value of the information to the public as a means of determining a good establishment from a bad establishment is relatively low...the public would only have a portion of the overall food safety picture, without fully understanding the complete food safety program.”

The Department expressed concern with respect to the disclosure of inspection reports by stating, “the disclosure of reports, particularly in large volumes may actually be harmful to public awareness and the safety process - since a layperson would not understand how the inspection process works” and disclosure “would be a disservice to the public and an unwarranted negative economic impact on the vendors.” Also, disclosure of inspection reports in large volumes “might disclose inspection trends and patterns undermining the law enforcement effort of the inspection process.”

Addressing the issue of public interest, the Department disagreed with the Applicant that the records requested constitute a ‘public interest’ warranting a fee waiver. Although both parties agree the Applicant is able and has offered to disseminate the information to the public, the Department cautioned, “...without an adequate explanation of the meaning of the results it is unclear what contribution this would have.” The Department elaborated by stating “...the dissemination of the records do not relate to public interest. The actions taken on inspection results by the Department is of public interest but the reports do not highlight these results.” The Department acknowledged 16 requests for similar information in the past were received by the Department, eight of which the Applicants were media. The Department stated, “Articles have appeared in the print media, and on radio and television programs as a result of discussing selected establishments in their reports” however, “there has never been significant public debate.”

The Department acknowledged, “Food Safety reports are eligible for routine access under the Department’s Routine Access Policy. Applicants can request the most recent inspection report for up to three establishments.” The Department further advised since October 2003 when the Routine Access Policy came into effect, until the end of 2005, only 20 requests were received, 7 of which related to the same media outlet, showing that the public is not interested in the information, therefore it is not public interest.

In its submission the Department also expressed concern that a fee waiver in this instance “may encourage future additional large and unreasonable requests.”

ANALYSIS AND FINDINGS:

At the outset I wish to compliment the Department for the professional and considerate manner in which they worked with the Applicant to focus the scope of the access request, and to

clarify for the Applicant what information the Department was able to provide and at what cost. Similarly, the Applicant worked co-operatively when contacted by the Department.

The *FOIPOP Act* encourages and promotes accountability, transparency and openness of public bodies. This is an underpinning philosophy and of course carries into the discretion associated with section 11(7) of the *FOIPOP Act*.

The issues raised by the Department primarily relate or pertain to appropriate data interpretation, comprehension and public accessibility. In a letter from the Department to the Applicant, the Department stated, "Information on safe practices for food handling is always available on the Department's website and has been released to media outlets so that it can reach the broadest public audience possible. The best means to ensure public safety is in the enforcement and education process the Department employs." Additionally in its submission to the Review Office, the Department stated it "routinely communicates through the media (and also through the internet at www.gov.ns.ca/nsaf/foodsafety) information about the safe handling of food at home and educates on a regular basis individuals working in food establishments about safe food handling practices." I believe the concern of the Department that "...a layperson would not understand how the inspection process works..." solely via the disclosure of inspection reports, may be tempered through the Department's established and ongoing public education efforts.

In terms of the time and effort associated to process this request, I am mindful of the comment made by the former Review Officer, originally in Report FI-02-47 and in subsequent Review Reports, "The time spent gathering and processing the information should not be the only gauge used in assessing fees."

From the standpoint of whether it would be fair and appropriate for fees in this instance to be waived, the following guiding factors set out by the Ontario Freedom of Information and Protection of Privacy Commissioner in Order P-760 are relevant considerations;

- 1) the manner in which the Department attempted to respond to the Applicant.
- 2) whether the Department worked with the Applicant to narrow or clarify the request.
- 3) whether the Department provided any documents to the Applicant free of charge.
- 4) whether the Applicant worked constructively with the Department to narrow the scope of his request.

- 5) whether the application involves a large number of records
- 6) whether or not the Applicant has advanced a compromise solution which would reduce costs.

I am satisfied the answers to the factors listed in numbers 2), 4), 5), and 6) are yes. With respect to number 3) documents are available through the Department's Routine Access Policy.

On balancing the comments and guiding factors by the former Review Officer, the Privacy Commissioner, and considering the submissions of both parties, in this instance I am satisfied the Applicant is not serving a private interest, rather a public one. I believe there is a reasonable expectation that the public may benefit from disclosure of the records at issue and the Department's Routine Access Policy supports the importance of public dissemination of this type of information. Therefore I am satisfied 'public interest' envisioned by the *FOIPOP Act* exists. I also believe the Applicant intends to disseminate the information received from this application and has the means and ability to do so.

RECOMMENDATIONS:

That the Department of Agriculture and Fisheries:

- 1) reverse its decision not to grant a fee waiver in this instance; and
- 2) reimburse any fees paid by the Applicant in relation to this Request for Review.

Section 40 of the *FOIPOP Act* requires the responsible officer to make a decision on these recommendations within 30 days of receiving them, and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the Department of Agriculture and Fisheries is deemed to have refused to follow these recommendations, and the Applicant has a right to appeal to the Supreme Court of Nova Scotia.

Dated at Halifax, Nova Scotia this 12th day of July 2006.

Dwight Bishop
Acting Review Officer